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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	MM Docket No. 87-268
and Their Impact upon the	)	
Existing Television Broadcast Service	)	

To the Commission:

JOINT REPLY COMMENTS

Paxson Communications Corporation, The Christian Network, Inc., and Whitehead Media, Inc. ["Joint Parties"], by their attorneys, submit herewith their Joint Reply Comments in response to the Commission's Sixth Further Notice Of Proposed Rule Making ["Further Notice"] in the above-captioned proceeding.[1/]

Introduction

The Commission's tentative decision to condition all television modification applications pending as of July 25, 1996 on the outcome of the DTV proceeding[2/] unfairly prejudices the Joint Parties and other broadcasters who had such applications pending before the Commission on July 25, 1996. The Joint Parties own television stations throughout the United States and as of July 25, 1996, had twelve modification applications on file, some of which had already been pending for a year. The applications propose substantial improvements to the Joint Parties' broadcast facilities and represent significant monetary investments. The Joint Parties had no notice than any adverse condition relating to DTV would be imposed on modification grants and

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1/ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, FCC 96-381 (August 14, 1996) ["Further Notice"].

2/ Id. para. 63.

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therefore relied on established Commission policies in planning these improvements and investments. The Commission's sudden departure from longstanding policy will have a harsh and inequitable impact on the Joint Parties and other broadcasters who acted reasonably and in good faith to improve station facilities.

The Commission's tentative decision also contravenes longstanding Commission goals of ensuring diversity and competition in the broadcast industry and constitutes an unconstitutional retroactive rulemaking. The Joint Parties therefore urge the Commission not to apply the conditional approval policy to those modification applications that were pending at the time of the Further Notice's adoption.

Conditioning Approval of Pending TV Modification Applications on the Outcome of the DTV Proceeding is Inequitable.

By applying its conditional approval policy retroactively to all television modification applications that were pending on July 25, 1996, the Commission has left the Joint Parties and other similarly-situated broadcasters in a far worse position solely as a result of their wholly reasonable reliance on longstanding Commission practices and procedures.

The Commission gave no prior notice that it intended to alter the modification approval process as it applied to pending applications, nor did any previous notices in this proceeding propose such a policy. 3/ Thus, in preparing and filing their modification applications, some of which were filed over a year ago, the Joint Parties relied on the Commission's practice over the past nine years of not conditioning approval of modification applications on the outcome of the

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3/ As a matter of fact, the Commission explicitly chose not to limit modifications to existing television broadcast operations. Second Further Notice of Proposed Rule Making, 7 FCC Rcd 5376, 5383 (1992).

DTV proceedings. With that in mind, broadcasters have approached facility modifications as they always had, incurring significant expense in preparation for the Commission's approval of a modification application. Specifically, the Joint Parties estimate that the facilities proposed in their pending applications will cost between $1.2 million and $2.8 million for each facility. The total cost is estimated to exceed $24 million. Obviously, a portion of this money has already been invested in the time and services that are required upfront to conduct preliminary engineering studies, to research equipment availability and configurations, and to ensure site and building access, among other things.

The Supreme Court has recognized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides an exceedingly persuasive justification."[4/] Moreover, the Commission has noted that the retroactive application of a procedure is inequitable and disruptive to business.[5/] It is certain that conditional approval of the Joint Parties' applications will result in substantial disruption to the Joint Parties' efforts to improve their facilities. If the Commission rescinds its approval of the modification applications based on the DTV proceeding, the Joint Parties will lose a substantial investment that could never be recouped. Indeed, not only will the Joint Parties suffer, but local communities who will undoubtedly benefit from improved technical service will be harmed as well. These inequities, standing alone, warrant reconsideration of the Commission's tentative decision.

4/ Heckler v. Mathews, 465 U.S. 728, 746 (1984).

5/ Cf. Amendments of Parts 20 and 24 of the Commission's Rules, 3 CR 433, 471 (1996); CATV of Rockford, Inc., 38 FCC 2d 10, 15 (1972), reconsideration denied, 40 FCC 2d 493 (1973).

The Commission's rationale for adopting its conditional approval policy also does not outweigh the substantial harm adoption of the policy will cause. Retroactive application of the conditional approval policy serves only minimally the objectives the Commission cites. The Commission is concerned that changes to existing NTSC operations will affect replication of service areas as contemplated by DTV.[6/] However, processing only those applications already on file as of July 25, 1996—applications made without notice of a potential change in the approval process—would not adversely affect the Commission's goals. The number of pending applications is finite. The grant of such a limited number of applications without condition would not affect service area replications any more than applications approved prior to adoption of the Further Notice.[7/]

Particularly in the absence of notice, the Commission's established practice is to grandfather applicants and licensees not in compliance with newly announced rules.[8/] Such a policy should apply here. Grandfathering would have a minimal impact on other broadcasters and future DTV operations. Broadcasters whose modification applications were approved prior to the adoption date of the Further Notice would remain unaffected because they are not subject to the DTV condition. Broadcasters who filed such applications after July 25, 1996 would not be

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6/ Further Notice para. 63.

7/ The Commission recognizes that the current DTV allotment will "unavoidably result in some degree of interference to both NTSC and DTV stations. Id. para. 40.

8/ See, e.g., Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, 3 FCC Rcd 5024, 5025 (1988) (grandfathering the location of broadcasters' public files); Deletion of Section 97.25(c) of the Amateur Rules, 66 FCC 2d 1, 1 (1977) (grandfathering the right of a licensee to apply for the Amateur Extra Class license without examination); Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross ownership); Second Report and Order, 50 FCC 2d 1046, 1074 (1975) (grandfathering broadcast-newspaper cross ownership).

prejudiced because they would have had notice of the DTV condition. And, future DTV operations will not suffer because future allotments may be adjusted to accommodate the modifications at issue.

In sum, retroactive application of the conditional approval policy is unfair, could result in the loss of substantial investment by broadcasters and is unnecessary to preserve the allocations made in the DTV Table of Allotments.

Retroactive Application of the Conditional Approval Policy Is Unconstitutional.

Federal agencies such as the FCC are precluded from issuing a rule that has a retroactive effect unless Congress has explicitly conferred the power on the agency to do so.[9/] The Commission's decision to apply its conditional approval policy retroactively violates this prohibition.

The D.C. Circuit and the Commission have established five factors to be balanced in determining whether a new rule is being applied retroactively in violation of constitutional requirements:[10/] (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or just an attempt to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.

9/ Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

10/ E.g., Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); Adelphia Cable Partners, 2 CR 76, 82 (1995).

Under these factors the Commission's decision was retroactively applied. This is not a case of first impression because the Commission has long-established procedures for processing TV modification applications. The conditional approval policy also is a significant departure from the Commission's past practices. As discussed above, the Commission had not previously conditioned approval of modifications on any DTV proceedings, nor had it given any notice that it intended to alter the modification approval process. In addition, the Commission commonly grandfathers applicants and licensees not in compliance with the newly announced rules. With regard to the third and fourth factors, broadcasters—including the Joint Parties—have relied heavily on the Commission's previous practices and procedures, going to great expense to prepare for the approval of their pending applications. Moreover, since production schedules were prepared and initial procurements made, the burden retroactivity would impose is significant. Finally, there is no statutory provision that directs the Commission to apply its conditional approval policy to applications pending as of July 25, 1996. Under this test retroactive application of the conditional approval policy to pending applications is unconstitutional and must not be adopted.

Although the Commission may deny an application if it changes the substantive standards for approving an application such that the applicant is no longer qualified,[11/] qualification is not at issue here. The conditional approval policy is a procedural mechanism only.[12/] The Commission's decision in the Further Notice does not change the substantive

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11/ E.g., United States v. Storer Broad. Co., 351 U.S. 192 (1956); Hispanic Info. and Telecomm. Network v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

12/ See Further Notice para. 63.

standards for approving or disapproving modification applications nor does it disqualify any of the applicants. In short, the Commission does not have the authority to apply its conditional approval policy on a retroactive basis.

The Conditional Approval Policy Defeats the Commission's Goals.

The Commission's longstanding goals in regulating broadcast stations have been to increase competition and diversity in programming,[13/] as well as to further economic growth and employment opportunities in the telecommunications industry.[14/] The Joint Parties are planning to spend between $1.2 million and $2.8 million to upgrade each of their television transmission facilities. With only conditional approval, broadcasters like the Joint Parties will be reluctant to invest this amount of capital to improve their facilities when the modifications may later be curtailed or eliminated. By contrast, with an unconditional modification approval, broadcasters would be more willing to make the kinds of capital improvements described above. Local economies would benefit from the investment of millions of dollars in upgrading transmission equipment. Improved transmission facilities also will allow broadcasters to serve larger audiences and allow for an increase in competition for local advertising revenue. By adopting its conditional approval policy, communities where the Joint Parties have modifications pending such as Kenosha, Wisconsin, Burlington, North Carolina, and Oklahoma City, Oklahoma will be deprived of the benefits of improved facilities.

13/ See, e.g., Multiple-Ownership of Standard, FM, and Television Stations, 45 FCC 1476, 1476-77, reconsideration denied, 45 FCC 1728 (1964); Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 172, 177-78 (Feb. 1, 1996).

14/ Further Notice para. 3.

Conclusion

The Commission arbitrarily included all modification applications pending as of July 25, 1996 within the scope of its tentative policy to condition TV modifications on the outcome of the DTV rulemaking proceeding. Based on the harsh results such a policy has for broadcasters, the Commission must reverse this tentative decision. Moreover, adoption of such a policy would constitute an unconstitutional retroactive rulemaking and deprive the public of improved and more diverse television service. The Joint Parties urge the Commission not to impose a DTV condition on its approval of TV modification applications that were pending on July 25, 1996.

Respectfully submitted,

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